Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHz Frequency Band	)	
	)	
and	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	
800 MHz SMR	)	

To: The Commission

COMMENTS OF SMR WON

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SUMMARY OF ARGUMENT

SMR WON, a trade association of small business SMR operators in 32 states, cannot support the Commission's re-auction of already licensed frequencies in the 800 MHz spectrum to a new entity. SMR WON represents both small rural operators and large independent "small businesses" in mid-sized metropolitan areas with gross revenues approaching but not exceeding $15 million annually. Actually, the most successful and largest small business SMR operators, and thus the strongest competitors to Nextel, are just as likely as smaller SMR operators to be injured by the FCC's proposal.

The FCC's industry restructuring would eliminate small business competitors providing low-cost SMR service in mid-sized metropolitan and rural markets. The proposed structure would reduce competition, raise consumer prices, eliminate competition in the equipment market, and inhibit the introduction of competing technologies. These effects are occurring in the market now - the anti-competitive effects started injuring the market last year, in 1994, as excessive frequency warehousing was practiced both by large market corporate SMR licensees and application mills. The Commission's proposal would exacerbate, not eliminate, those anti-competitive effects.

The FCC lacks authority to re-auction licensed spectrum to new competitors in the same service. Congress never intended or authorized non-spectrum, "geographic market" overlay auctions, or

the disruption of an existing service merely to re-arrange which competitors hold the licenses for those services.

There is no spectrum to auction. Insufficient frequencies are available for relocation. The Commission's plan for "voluntary" relocation is inadequate, damaging to the existing market, and injurious to present public service. Existing operators are hemmed in by frequency warehousing and cannot grow - either by providing new capacity to their expanding customer base, or by growing geographically.

The auction structure proposed can only be won by one licensee - Nextel, which has so concentrated frequency control through completed and pending acquisitions that it would prevail whether "voluntary" or "mandatory" relocation were used, and even if it did not win the auction in any particular market.

The FCC is taking, without full compensation, for the Federal Government auction, the existing licensee's property rights separate from the license, including the fair market value of the proceeds from the sale of the license to the aggregating wide-area geographic market licensee. In re Ridgley Communications, Inc., 139 B.R. 374 (Bankr. D. Md. 1992); In re Walter O. Cheskey, 9 FCC Rcd. 986 (CCB 1994).

Small business SMR operators need relief from spectrum warehousing in 1995 - not three years from now, after many of them are forced out of business. Modifying licenses to apply extended construction to no more than 50 unconstructed channels per site; enforcing 90.609 (b) to prevent proposed transfers of

unconstructed facilities, except for wide-area requests to reuse existing, operating frequencies within an existing footprint, and other remedies must be implemented now to provide spectrum relief and encourage other equipment suppliers to develop digital equipment for this market. Tax certificates would be available for any frequencies donated to a Relocation Pool, for the fair market value of the frequency released.

Establishing a Relocation Pool which would accommodate the "domino effect" of relocating and disrupting existing service in a fully licensed band, and a Geographic Competitive Equity Premium for relocated SMR licensees, are preconditions to any notion this existing service can be re-auctioned. Defining the issue as the "cost of relocation" undervalues significantly the rights being taken without compensation; the only lawful and fair approach is to provide relocation incentives equivalent to the fair market value of the transferred frequency in the hands of the aggregating transferee - and not the transfer of that property right back to the Federal government for the auction coffers.

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To: The Commission

COMMENTS OF SMR WON

SMR WON, Inc., (SMR WON) a trade association of 800 MHz SMR operators, by counsel and pursuant to Section 1.415 (a) and (b) of the Commission's Rules, hereby submits its Comments to the Commission's Further Notice of Proposed Rule Making ("FNPRM") in the above docket, released November 4, 1994.

I. INTRODUCTION

A. Overview of the Commission's Industry Restructuring.

Taking an "expansive view"[1/] of the SMR industry not supported by the facts[2/], the Commission has proposed to scuttle a small business industry established 25 years ago in favor of a single company and its failed technology experiment.[3/]

Nextel's new technology, and proposed new industry structure, conveniently fails to account for its small business licensee competitors, and also lacks consumer acceptance.[4/] Also, Nextel and Motorola have admitted that their hope of entering the cellular market is not realistic, and have abandoned such claims.[5/] As a result, the overblown premises on which the Commission adopted, on August 9, 1994, Nextel's spectrum-clearing proposal of June 20, 1994, have evaporated as of January 5, 1995, and are no longer believed even by a hopeful Wall Street. The

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1/ Third Report and Order in GN Docket No. 93-252, slip op. at 9 para. 14 (released September 23, 1994) (hereinafter "Third Report & Order"); See also Further Notice of Proposed Rule Making in PR Docket No.93-144, slip. op. at 4, ¶ 2. (November 14, 1994) (hereinafter "FNPRM").

2/ See generally Sections II and III herein, "Description of the Market" and "Regulatory History", as well as the exhibits and tables attached hereto.

3/ See "For Nextel, '94 Was Best of Times and Worst of Times", Wall Street Journal, p. 14, January 3, 1995, Exhibit L hereto. The Commission specifically premised its proposal on Nextel's request for wide-area restructuring of the industry. See Third Report and Order, supra, at 53-55, ¶¶ 90-93.

4/ See Wall Street Journal article of January 1, 1995.

5/ Land Mobile Radio News, Vol. 48, No. 47, p.1 (December 2, 1994), quoted in these comments.

Commission cannot rely on such unsupported claims as the basis for this rule making. Just as Nextel, Motorola, and Wall Street have abandoned the "SMR to Cellular" hype of mid-1994, so must the Commission review the market and technology promises on which it hopefully, but erroneously, adopted this proposal on August 9, 1994.

Even Nextel's ESMR digital nationwide-area service proposal may be in serious economic trouble.[6/] The Commission is not in the business of "bailing out" one company's flawed technical and economic plans by removing from a relevant market hundreds of legitimate operating competitors and three competing manufacturers.[7/]

The facts never supported the restructuring of this industry, and the Commission's vague industry "view" also is inconsistent with the Department of Justice's market analysis[8/]; Not only does the Commission lack the authority to auction licensed spectrum from one competitor to another in the same

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[6/] See Wall Street Journal, p. 14, January 3, 1995, supra.

[7/] Notwithstanding the Commission's claims that it will simply "relocate" current licensees, the relocation plan is so non-existent, and incapable of implementation, that the end result will be the elimination of many competitors, if only through the business uncertainty generated by the Commission's flawed and inattentive proposals. See discussion at Section E.

[8/] See Department of Justice descriptions of the separate SMR product and geographic markets, attached hereto as Exhibit F.

service,[9] it also is not in the public interest to disrupt the current market.

Further, the Commission is unlawfully expanding its Regulatory Parity authority not simply to equalize regulations, such as which application forms to use, but to override and distort the SMR marketplace through regulation, resulting in less competition within the SMR market on price, equipment manufacturers, and technology innovation.[10] Also, the Commission is taking from licensees valid property rights, namely, the value of the business and proceeds from potential fair market sale of the license, and seeking to capture that value for the Federal Government through auction, without adequate compensation to existing licensees.

Finally, the Commission's plan is fatally flawed. The proposed restructuring of the market will not work, and will leave independent SMR operators stranded and unable to grow. The largest competitors to Nextel will be most severely injured, but all SMR operators are vulnerable. The "mandatory relocation option" proposed by the Commission[11], cannot be implemented because there is no identifiable spectrum available for relocation, and the Commission is avoiding its responsibility to adequately compensate and provide for existing, operating

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[9] See SMR WON Petition for Partial Reconsideration of the Third Report & Order (attached hereto as Exhibit B).

[10] See EMCI economic study, attached as Exhibit D.

[11] FNPRM, p. 23, ¶ 36.

licensees by refusing to construct, manage, and oversee a fair and adequate relocation program. The Commission proposes to leave relocation's haphazard resolution to private hands. The Commission plan does not avoid and correct "warehousing" as it suggests,[12/] but rewards it, and ignores the already oppressing concentration of the SMR market.

As a result of the Commission's proposals, the nation's smaller metropolitan markets and rural areas will receive less service at higher prices. The nationwide market as a whole also will be hurt by reduced competition among equipment manufacturers and a reduction in the roll-out of competing technology innovations to solve the problems with the current MIRS system.

B. **SMR WON.**

SMR WON is a trade association of close to 100, 800 MHz SMR operators and SMR equipment manufacturers. Exhibit A lists the thirty-two (32) states in which SMR WON members operate. SMR WON was formed in September, 1994 in response to the Third Report & Order in GN Docket No. 93-252, on which this FNPRM is based. SMR WON was organized to represent the interests of SMR operators providing existing service to the public in smaller metropolitan markets and rural areas.

[12/] The Commission states only that it is "eliminating" past warehousing regulations, but proposes to substitute 3-5 year extended construction periods on the same frequencies now being warehoused under 5-year construction grants. Compare FNPRM at 5, ¶ 2, with p. 27, ¶ 46. This non-solution will leave smaller metropolitan areas and rural areas without service, or with less service.

Since its formation, SMR WON has initiated meetings with the Commission staff, Congressional offices, PCIA, AMTA, and Nextel in an effort to explore areas of compromise to promote competition in the SMR 800 MHz band.[13/] SMR WON's objectives in these discussions are similar to their objectives in filing these comments:

1. Increasing competition among SMR service providers and equipment manufacturers.

2. Enhancing and maintaining price competition in the provision of mobile radio services to the public;

3. Encouraging the early introduction by the existing manufacturers of new equipment to serve existing and new customers.

4. Maintaining and increasing opportunities for small business in the provision of mobile radio service.

SMR WON's members are affected by the rules proposed in this Docket, and would be injured in their businesses and ability to serve the public were the rules proposed herein adopted. These comments describe not only the injuries, but also discuss potential solutions.

[13/] SMR WON and its representatives and counsel have met three times with Nextel and AMTA in recent months, for example, in separate and joint meetings; twice with representatives of PCIA, and have had phone discussions with PCIA and ITA also. The most recent of these direct meetings took place the week before the filing of these comments. SMR WON initiated many of these meetings through counsel-to-counsel contacts with Nextel. Other meetings were arranged jointly through AMTA. SMR WON members also have attended various subcommittee meetings of AMTA and PCIA during this same period. SMR WON expects these meetings and discussions will continue.

On December 21, 1994, SMR WON filed a Petition for Reconsideration of the Third Report & Order. The FCC proposes herein to establish a "new framework for licensing of...SMR...systems".[14/] The FNPRM "proposed rules...are a direct outgrowth..." of the "recently adopted Third Report & Order...."[15/] The arguments and data advanced in SMR WON's Petition for Reconsideration of the Third Report and Order are directly relevant to the proposed rules herein. A copy of SMR WON's Petition is submitted as Exhibit B hereto, and incorporated in this record.

II. DESCRIPTION OF THE SMR MARKET

A. Price Competition.

Independent SMR operators are a robust and growing industry providing the public with the lowest-cost mobile radio service available. Independent SMR operators are capital efficient, profitable, and provide competitive services to a substantial industry segment which prefers SMR service over cellular. Services include dispatch and interconnect mobile telephone service to police and fire departments, hospitals, professionals, and high-volume users in delivery, construction, transportation, manufacturing, and agriculture.

Price and quality service are important hallmarks of the SMR market. Cellular, and indeed, ESMR, cannot, and choose not, to

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14/ FNPRM, slip op. at 4.

15/ FNPRM, slip op. at 4.

compete with SMR on monthly air-time price.[16] While traditional SMR generally does not permit hand-off between cells, and does not offer as many "features" as cellular and ESMR, these features are not as important as price to the SMR customer base.[17]

SMR is able to offer the lowest-price mobile radio service because it has the lowest capital cost infrastructure, a technology characteristic the Commission recognized when it originated the SMR service in the 1970s. Recognizing the public demand for lower-cost services, and in contrast to multi-cell cellular service, the Commission created a competing service which relied on higher-power cells covering a wide area.[18] As a

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[16] The average monthly air-time charges on independent SMR operator services, both for dispatch and interconnect customers, are in the $14-18 per month range; comparable amounts of air time on cellular and ESMR service average between $24 per month for basic ESMR service (before air-time charges) to over $55 per month for cellular and ESMR air time. The price for interconnect service is, on average 25% to 40% less on independent SMR systems than that of competing cellular service in the same markets. See Letter of Bob W. Roberts, P.E.C. Mobile Communications, Springfield, Illinois, and Declaration of William Wyatt, Total Com., Inc., Enid, Oklahoma, attached hereto as Exhibit C. The average interconnect charges stated by EMCI in the attached report (Exhibit D) include Nextel ESMR averages, which are higher than independent SMR rates, thus driving up the industry reported average. Nextel generally increases system basic and airtime charges upon acquiring a competitor and entering the market. See Declaration of Fred Goodwin, attached as Exhibit E.

[17] This sentence was written before the Wall Street Journal reported the same conclusion. "Most of [Nextel's] current customers are not interested in the bells and whistles...". See Wall Street Journal, January 3, 1995, "For Nextel, '94 was the Best of Times and Worst of Times," p. 14 (attached hereto as Exhibit L)(brackets added).

[18] Those espousing SMR market conversion to cellular have attempted to appropriate the term "wide area" to describe their system. In fact, ESMR cells are smaller radius cells at lower

(continued...)

result, those wishing to defeat low-cost competitors, and successfully remove them from the market through a variety of programs, including the Regulatory Market Restructuring being attempted in this docket[19], talk not about their price of service, but about advanced features, "spectral efficiency", "frequency capacity", "digital, innovative technology", and promises of future, but not present, price reductions.

Reduced to essentials, this fight is about control of licensed service and price competition for mobile radio service - not in the future, but in the present. The issue is whether the Commission will continue to use its regulatory power to restructure and eliminate a price-competitive market it created two decades ago, and reduce all mobile radio competition essentially to one surviving structure and licensee using a high-cost, high-priced, small cell, cellular-like system.

Another essential characteristic of this thriving market is SMR's ability to service a large fleet of vehicles. This

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[18](...continued)
power serving a smaller area than traditional wide-area SMR technology. The result of "small cell" technology is greater capital cost not only to build more "small cells" but also to tie them together with expensive switching technology. Small cell technology requires "hand-off" between cells which cover the same area as one "wide-area" traditional SMR cell. Thus, greater capital investment is necessary to serve the same territory, and this drives prices to the consumer, on average, 60% to 75% higher for such systems than on wide area SMR systems. See EMCI Study, Exhibit D.

[19] This market restructuring is referred to by the Commission herein as the "new framework for licensing of Specialized Mobile Radio..." See FNPRM slip op. at 4, ¶ 1.

essential characteristic distinguishes SMR from cellular-type operations.

The Department of Justice has recognized that these two features, price and fleet service from wide-area cells, distinguish SMR from cellular service:

> Trunked SMR service on 800 MHz, 900 MHz and 220 MHz is a relevant product market. Conventional dispatch service is not a substitute because it affords lesser privacy and lower reliability. Mobile telephone service is not a substitute because it is significantly more expensive than SMR service, is significantly more difficult for customers to restrict communications to the defined fleet or group, and because it cannot be provided on a one-to-many dispatch basis.[20/]

In contrast, the Commission has substituted its own erroneous and unsupported "expansive view" of the relevant market in order to attempt to justify its restructuring of the SMR market through regulation:

> "...we have chosen to take an expansive view of the present condition of competition among services in the CMRS marketplace, and of the potential for competition among these services in the future, because such a view maximized the range of services that can be considered to be substantially similar."[21/]

[20/] United States of America v. Motorola, Inc. and Nextel Communications, Inc., Case Number 1:94CV02331, Complaint at 6 (filed October 27, 1994). Attached hereto as Exhibit F. The Department of Justice was describing the SMR market in the nation's top 15 urban areas. Outside the top 50 markets, 900 MHz frequencies have not yet been licensed. 220 MHz operations also are severely under-developed in most markets, and insignificant at present. 800 MHz SMR operations represent the SMR market exclusively in most markets outside the top 50, and predominantly even with many of the top 50 markets.

[21/] Third Report & Order, supra, slip op. at 9-10, ¶14.

This "expansive view" is just that - a "viewpoint" only, not grounded in market fact, but conceived to justify an about-face in market structure and to create new auctions.[22/]

Attached hereto as Exhibit D is a market analysis of the SMR industry prepared for these comments by EMCI. SMR WON commissioned this study based upon the recent recommendations by Commission personnel that parties submit economic studies with their comments.[23/] EMCI for many years has prepared economic surveys of the SMR, paging, cellular, and mobile radio industry for various trade associations and communications service providers, and is recognized as one of the leading telecommunications economic consultant firms in the mobile radio industry. EMCI relied upon its independently produced market surveys and forecasting materials in preparing this industry analysis for the Commission.

This economic analysis demonstrates what the Commission has been saying for many years, and what the Justice Department recently has confirmed. Traditional SMR is a growing, robust, profitable, competitive market, distinct from cellular, which provides a price-competitive and valuable service to a

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[22/] Only a few months earlier the same Commission declined to adopt this "expansive view" and include SMR within the "auctionable" classification. The reason given was a practical one - SMR was a mature market, already licensed for the most part. See Second Report and Order in GN Docket 93-252, 9 FCC Rcd. 2348 (1994).

[23/] Such studies were directly solicited from the SMR industry by Gregg Rosston, FCC Economist, speaking at NABER's Government Affairs Summit and Fall Conference, September 28, 1994.

substantial segment of the public.[24] The Commission itself, when not attempting to restructure the market through regulation, similarly has described the SMR industry:

> This plan to promote use of the spectrum by encouraging the entrepreneurial offering of private land mobile service has been immensely successful. Of the four 800 MHz service categories, the SMR category has shown the highest activity. It has also shown a great degree of operational and technical sophistication.[25]

Recent Commission studies reiterated the SMR industry's strength and breadth of public service to underserved areas of the country:

> This service, little known to the general public, has rapidly developed into one of the most exciting industries regulated by the Commission. SMR service is available in more of the country than better known services such as cellular radio and cable TV. This service has been copied in many European countries, Canada and Japan. SMR systems today provide service in the U.S. to over one million radio users. By the twenty-first century, SMRs will be a multibillion dollar industry providing critical communications support to several million American workers.[26]

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[24] See generally EMCI study, "Analysis of Impact of FCC's Wide Area SMR Licensing Proposal", January, 1995, Exhibit D hereto.

[25] Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, Report and Order, 64 P&F Rad. Reg. 2d 1042, 1045 (1988) (Hereinafter "End User Eligibility").

[26] "Specialized Mobile Radio", Doron Fertig, Policy and Planning Branch, Land Mobile and Microwave Division, Private Radio Bureau, FCC, at 3 (February, 1991). Attached hereto as Exhibit G.

B. Competition Among Manufacturers.

Presently the SMR industry has four primary equipment suppliers: Motorola, Ericcson/GE, Uniden, and EF Johnson.[27/] Currently, Motorola has approximately 58% of the SMR market, EF Johnson approximately 16%, and Uniden has 12% and Ericcson/GE has 9%.[28/] As part of a complex equipment purchase arrangement, Nextel agreed to purchase Motorola equipment, in return for Motorola agreeing to sell its SMR licenses nationwide to Nextel in exchange for approximately 24% of Nextel's voting stock.[29/] Through this vertical integration of the largest SMR manufacturer and service supplier, it is expected that Motorola's share of the market will become dominant, serving in excess of 70% of the currently licensed SMR channels after Nextel's proposed acquisition of the license holdings of OneComm in sixteen Western states, and of Dial Page in twelve Southeastern states.[30/] This would leave 30% or less of the SMR equipment market for division among the remaining three competitors, with an average market share of 10%. This extreme market concentration would reduce the number of competing manufacturers and threatens to "inhibit the deployment of alternative technologies"[31/]

[27/] See EMCI study, Figures 5 and 6.

[28/] See Exhibit D, EMCI Market Study, Figure 5.

[29/] USA v. Motorola, Nextel, supra, Complaint at 1-2.

[30/] See EMCI study at paragraphs 39 and 40.

[31/] Department of Justice CIS at 13.

SMR WON's members already have found that the current frequency warehousing and announced agreements for merger of OneComm and Dial Page with Nextel are having inhibiting effects on the interest of competing manufacturers to introduce new technology for the SMR industry.[32/]

C. Independent Operator Innovation; Regional Networks.

Northwest Wireless Network provides an important example of traditional SMR operators' competitiveness and innovation. Forty (40) SMR operators in Washington State, Oregon, Idaho, Montana, and Wyoming, who were precluded from obtaining wide area networks under the FCC's restrictive extended construction/aggregate loading waiver requirements, have formed a corporation, Northwest Wireless Network, which will offer "roaming", i.e., networked voice and data services via a microwave and leased line backbone, to its customers throughout these states. Northwest Wireless is in Phase One of constructing network backbones from Canada to the California border, and others linking Seattle, Portland, Spokane, Kennewick, Pasco, Boise, ID, and other communities. Northwest Wireless currently is purchasing switches and other equipment and entering into the agreements necessary for construction. Northwest Wireless' business plans call for conversion from

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[32/] The Department of Justice has singled out the top 15 major cities in the United States as the markets in which competition would be lessened. See Department of Justice Competitive Impact Statement, U.S. v. Motorola, supra, at 2 (hereinafter "CIS:). See Exhibit F hereto.

analogue to digital communications within one to two years after construction of the backbone.

Northwest Wireless has been constructed without assistance from the FCC's wide area waiver policies, and, indeed, was born out of frustration with the limited focus of the FCC's waiver policies. Northwest was advanced by the operators' interest in providing enhanced SMR services using the existing EF Johnson LTR communications format in which these licensees have substantial investments.

At least three other regional networks of independent operators are in the process of formation in Texas, Minnesota, and Michigan.[33/] These regional networks represent the innovative and competitive determination of the nation's small business SMR operators to serve new markets, anticipate customer needs, meet competitive demands, and develop new technologies. As demonstrated below, the anti-competitive monopolization of the market, including the equipment market, threatens to snuff out such innovation before it gets a chance to take hold, and before other, higher-priced SMR operators move into these markets.

[33/] See EMCI Economic Report, Exhibit D

III. REGULATORY HISTORY

The "Contract with America" includes proposed legislation to "enact small business incentives".[34/] In addition, the new Congress is expected to review the way its delegated agencies regulate markets:

> ...the Republicans have triggered a re-thinking of how to regulate - or not regulate - the nation's workplaces, banks, drug industry, financial markets and educations system. No rule, federal program, government agency or bureaucrat is exempt from scrutiny...[35/]

The Commission first created this small business communications industry to serve the growing needs for alternative mobile communications delivery mechanisms. While the alternative regulatory plan for SMR has been subject to much contentious opposition from the common carrier industry over the years, since SMR represented a lower-cost way to get mobile communications service to the public[36/], nevertheless the Commission and Congress have developed, encouraged, nurtured and protected this alternative structure, to serve the public which prefers and needs it.

The Regulatory Parity legislation of 1993 did not require market restructuring and elimination of this small business

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34/ Washington Post, p. A-11, January 5, 1995.

35/ Washington Post, p. A-1, January 4, 1995.

36/ See especially the 1982 amendments to Section 332 (c) of the Communications Act, Pub. L. 97-259, Title I, § 120(a), 96 Stat. 1096, 47 USCA § 332 (c), at p. 429 (1991 ed.) See also Senate Report Nos. 97-191 and 97-404, and House Conference Report No. 97-765, see 1982 U.S. Code Cong. and Adm. News, p. 2237.

alternative mobile communications delivery mechanism. Reversing its position of a few months earlier,[37] the Commission has embarked on a radical market restructuring, stretching questionable legal authority and with a minimum of "scientific and economic analyses."[38] The regulatory history below demonstrates that the instant course is out of step with the Commission's decades-long support of this low-cost alternative communications delivery structure, and its resulting competitive benefits to the economy and the public.

The Commission first allocated 800 MHz spectrum for land mobile use in 1970.[39] The Commission then established the Specialized Mobile Radio ("SMR") service in 1974.[40] The Commission designed the SMR service to offer land mobile communications on a commercial basis to those involved in private land mobile services.[41] Through the use of trunked systems,

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[37] See Second Report and Order in GN Docket 93-252.

[38] Washington Post, P. A-1, January 4, 1995.

[39] See First Report and Order and Second Notice of Inquiry, 35 FR 8644 (June 4, 1970) (allocating 115 MHz of spectrum in the 806-947 MHz band for mobile use).

[40] See Second Report and Order, 46 FCC 2d 752 (1974) (allocating 30 MHz to private land mobile services); Memorandum Opinion and Order, 51 FCC 2d 945 (1975); aff'd, National Ass'n of Regulatory Utility Comm'rs v. FCC, 530 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

[41] The Commission "intended to encourage a competitive private land mobile radio market, as well as to promote new systems designs, technology, and marketing techniques to develop the new spectrum to the maximum extent." In the Matter of Amendment of Part 90, Subparts M and S, of the Commission's Rules, 53 FR 12154 at 12155, 64 RR 1044 at 1045 (1988).

small and rural businesses obtained access to affordable, high-quality communications.[42] SMR service was ideal for heavy industry and service companies such as fleet users and dispatchers.[43]

The demand for such services rapidly began to outstrip the supply of available spectrum.[44] The Commission allocated an additional 50 channels in 1978 for commercial private mobile carriers,[45] yet by 1981, all available trunked SMR systems in New York, Chicago and Los Angeles had been allocated. The Commission attempted to meet the expanding demand by releasing additional frequencies for SMR operations in 1982.[46] Despite

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[42] Doron Fertig, Specialized Mobile Radio, Policy and Planning Branch, Private Radio Bureau, Federal Communications Commission (1991) [Specialized Mobile Radio] at pp. 4-5. See In re Implementation of Sections 3(n) and 332 of the Communications Act, Reply Comments of Southeastern SMR Association and SMR Operators in Idaho, South Carolina, Texas and California (filed July 11, 1994) at pp. 5-6 (discussing SMR market and noting airtime for SMR service on average is %25-%40 lower than comparable cellular services).

[43] The Commission made SMR service more attractive to dispatchers by granting SMR users permission to interconnect with the Public Switched Telephone Network ("PSTN") during the 1980s. Fleet users and other businesses, however, continue to dominate the market. See Notice of Proposed Rulemaking, 9 F.C.C. Rcd. 2596 (released May 20, 1994).

[44] The Commission noted in review of the SMR service's status in 1991 that SMR due to "the relatively high cost of building an trunked system and the general unavailability of private radio spectrum in major urban areas, few businesses could afford, or acquire sufficient spectrum for, trunked radio systems without SMRs." Specialized Mobile Radio at p.8.

[45] Order, 43 FR 35394 (1978).

[46] See Second Report and Order, 90 FCC 2d 1281, 1314-16 (1982) (releasing 250 channels for SMR use). The Commission further (continued...)

the Commission's actions to make additional frequencies available in the 900 MHz bands in the nation's fifty largest markets, the Commission was obligated to hold lotteries in all 50 major markets.[47]

This growth of frequency demand continued through the 1980s and into the 1990s. Within the first ten years following the initial license of an SMR system, the SMR service grew to 7000 systems and generated over one billion dollars annually in sales and services.[48] By 1991, all 900 MHz in the top 50 markets and most 800 MHz had been allocated.[49] Virtually all spectrum allocated to SMR services presently is allocated, with tens of thousands of applications waiting to be processed.[50]

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[46](...continued)
required all licensees and applicants to comply with Subpart S of 47 CFR Part 90, eliminating Part M. In the Matter of Amendment of Part 90, Subparts M and S, of the Commission's Rules, 64 RR at 1048-53 (1988).

[47] Id.

[48] Id. at 5 & n.5. The Commission later noted that by 1991 the SMR database nationally contained over 5000 licenses on over 32,000 channels in the 800 MHz band alone. Id. at 23. Over 1800 applications for licenses were placed on waiting lists in 35 areas. Id. at 16-17, 21-22 & n. 21.

[49] Specialized Mobile Radio at 14, citing Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd. 543 (1986) (noting all 900 MHz will have been assigned following lotteries already held). See also In the Matter of Amendment of Part 90, Subparts M and S, of the Commission's Rules, 64 RR.2d 1042 at 1043-44 (1988) (reporting that by 1988 there were "approximately 3,000 trunked SMR operators in the United States with some 670,000 mobile transmitters operating on them").

[50] The Commission recently accepted a gift of software to assist with the backlog of applications waiting to be processed. See 13 F.C.C. Daily Dig. 205 (October 31, 1994).